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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Wednesday,
April 29, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:300 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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C-O-N-T-E-N-T-S

WITNESS DIRECT CROSS REDIRECT RECROSS

Elisabeth Landes

By Mr. Shore 3336

By Mr. Rich 3348

Voir Dire by Mr. Rich on page 3339

Exhibit No. Description Mark Recd

None

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P-R-O-C-E-E-D-I-N-G-S

(9:32 a.m.)

CHAIRPERSON GRIFFITH: All right, let the record reflect, please, that the court reporter has been previously sworn and remains under oath.

Good morning, ladies and gentlemen.

Mr. Shore, you're up, I believe.

MR. SHORE: I am. As ASCAP's last rebuttal witness, we call Dr. Elisabeth Landes.

CHAIRPERSON GRIFFITH: All right, Dr. Landes. Good morning. Would you raise your right hand to be sworn, please?
Whereupon,

ELISABETH LANDES
was called as a witness, and after having been first duly sworn, assumed the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHORE:

Q Dr. Landes, would you please introduce yourself to the Panel?

A My name is Elisabeth Landes. I am an

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1 economist. I am employed by a firm called Lexecon,
2 Inc. in Chicago. And at Lexecon -- Lexecon is a
3 consulting firm, and principally we provide economic
4 analyses and very often in legal contexts such as
5 this.

6 Q Would you please briefly describe your
7 educational background?

8 A I received my undergraduate degree at
9 Radcliffe College where I majored in mathematics. And
10 I received a Ph.D. in 1974 from Columbia University in
11 New York in economics.

12 Q And would you briefly describe your work
13 experience since graduating from Columbia?

14 A After I left Columbia in 1974, I was a --
15 what's called a research associate which is
16 essentially -- had a post doctoral fellowship at the
17 National Bureau of Economic Research in New York and,
18 at the same time, in the economics department at the
19 University of Chicago.

20 I worked on a project at the National
21 Bureau for about two years until sometime, I think,
22 the middle of 1976 when I became the Charles R.

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1 Walgreen fellow at the University of Chicago, which is
2 again another post doctoral fellowship.

3 I then was a post doctoral fellow -- and
4 it's a long string of post doctoral fellowships -- at
5 the Center for the Study of Economy in the State at
6 the graduate school of business at the University of
7 Chicago.

8 And then in 1980 I joined Lexecon.

9 Q Would you describe briefly your previous
10 experience in the field of music licensing?

11 A In the course of my work at Lexecon, I
12 have been involved in consulting engagements at
13 Lexecon in connection with the Buffalo Broadcasting
14 case and with the NCTA case. So those are two music
15 licensings.

16 I have done work on a consulting basis for
17 BMI, and am currently engaged in the cable -- in work
18 that's related to the cable litigation between ASCAP
19 and the cable industry.

20 Q Okay, what is the purpose of your
21 testimony here today?

22 A I was asked to --

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1 MR. RICH: May I, before we move on,
2 assuming the qualification is over, may I ask a
3 question on the voir dire?

4 CHAIRPERSON GRIFFITH: Any objection?

5 MR. SHORE: No.

6 CHAIRPERSON GRIFFITH: All right.

7 VOIR DIRE

8 MR. RICH: Ms. Landes, just for
9 clarification, you indicated you consulted on the
10 Buffalo Broadcasting case. Are you there referring to
11 the anti-trust Buffalo Broadcasting case or the ASCAP
12 Rate Court litigation with Buffalo Broadcasting?

13 THE WITNESS: That was anti-trust.

14 MR. RICH: Thank you.

15 I have no further questions.

16 CHAIRPERSON GRIFFITH: All right, thank
17 you.

18 Go ahead, Mr. Shore.

19 DIRECT EXAMINATION (continued)

20 BY MR. SHORE:

21 Q What is the purpose of your testimony? I
22 believe you were answering.

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1 A Well, I was asked to read the testimony
2 provided by Adam Jaffe in this proceeding and to
3 provide an evaluation of that.

4 Q And what is your understanding of the
5 methodology that was proposed by Dr. Jaffe in the
6 testimony you read?

7 A Well, I understand that what Dr. Jaffe did
8 was basically to look at the last negotiated license
9 between the public broadcasters and ASCAP and to index
10 that forward to date on the basis of change in
11 programming costs and change in music use.

12 Q As an economist, what are your conclusions
13 as to the propriety of that methodology?

14 A Well, we don't usually comment on
15 propriety. But as a methodology, I think it is
16 severely flawed because it ignores a whole host of
17 other very important considerations.

18 To begin with, it -- Dr. Jaffe looks only
19 at measured music use, and I understand there's some
20 dispute about how it's measured and I don't have
21 anything to say about that. But he looks at measured
22 music use and he looks at the change in programming

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1 costs in the aggregate I think of the public
2 broadcasters.

3 So he has -- he looks at a very limited
4 set, I think, of criteria on which to base his
5 opinion. But more important, I think, and beyond
6 that, I think, is the fact that he has treated -- he
7 looks at this and has rendered an opinion as though it
8 were a retrospective case looking at what the fees
9 should have been for the period covering 1992 to 1997
10 as opposed to asking what are the appropriate fees for
11 the period covering -- or 1998.

12 I'm sorry if I'm misspeaking the date.
13 What are the appropriate fees for the five year future
14 period, prospective period, that is being considered
15 here. And as such, he really has not asked what is
16 the difference between how people -- and when the fee
17 was agreed to in 1992, presumably both sides had a set
18 of expectations about what was going to occur over the
19 period for which this fee was being set.

20 It is not asked how -- have those
21 expectations changed, how do they differ sitting here
22 today at a hypothetical negotiating table from what

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1 they were -- what their expectations were in 1992.

2 Q What is the relevance of the parties'
3 expectations in entering into the last license
4 negotiation and license?

5 A Well, clearly the position either party
6 takes on either side of the bargaining table is
7 determined by what they think -- what their
8 expectations over the period are. So that -- let me
9 just step back for a second.

10 Expectations are an important part of
11 economic theory. They are pervasive through all parts
12 of the economic theory. So that when we -- when
13 economists analyze questions of consumer choice, for
14 example, they ask about not only about what's price
15 and income today, which are the typical things that go
16 into a demand curve; what are the -- what is the
17 consumer's expectations about price and income over
18 the period of time for which the decision is being
19 made.

20 And that's clearly true as well in any
21 negotiating environment. There is a large literature
22 on game theory, for example, which uses a very -- it's

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1 an economic literature, but it uses a very different
2 lingo.

3 It talks about pay offs and strategies,
4 but it is essentially the same thing. When you look
5 over a period of time, you ask what is the economic
6 situation in which the person with whom I'm bargaining
7 sits in, what are the consequences of their choices,
8 what are my alternatives, and what are the
9 consequences of the choices I make today not just for
10 this price or this -- but for the future as well.

11 Q In your testimony you gave an example
12 about the Chicago Bulls. Would you explain that to
13 the Panel?

14 A That's my favorite because I think it
15 really highlights the issues here. And that is -- and
16 it's an example and it's an analogy; and it's
17 certainly not perfect, but it's also pretty much based
18 in fact.

19 I think I say if you assume -- which
20 actually I think occurred in 1992 -- that the Chicago
21 Bulls are negotiating with Michael Jordan, and they
22 negotiate a compensation package for the period of

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1 five years that he's going to play -- in the next five
2 years that he's going to play.

3 So from 1992 to 1997. During that period,
4 Michael Jordan gets older. And in addition, he
5 actually stopped playing baseball -- started playing
6 baseball, stopped playing basketball for a period of
7 time. So that his basketball skills during that
8 period of time certainly didn't improve.

9 But he came back to the Bulls in '96 or
10 1997. And in 1997 there was a renegotiation of his
11 contract.

12 Now if you applied Adam Jaffe's
13 methodology, you would expect that Michael Jordan's
14 agent and Michael Jordan would have sat down at the
15 bargaining table with the Bulls and they would have
16 said well, our total compensation package for the team
17 as a whole hasn't changed very much, and you certainly
18 haven't gotten any better over the last five years, so
19 we're going to offer you what you got last time.

20 Well, in fact, I think he got \$35 million
21 dollars for a one year contract at that time. And
22 it's because when they sat down at the negotiating

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1 table, the question was not what had happened over the
2 last five years, but we are facing a certain set of
3 pay offs over this next year.

4 With him we can win a -- perhaps win
5 something that without him we could not perhaps. Our
6 expectations are different. And as a result, the
7 outcome was substantially different than you would
8 have gotten from applying a methodology like Adam
9 Jaffe's.

10 Q In doing an analysis of a prior negotiated
11 fee, what factors would you look at to determine what
12 the parties' expectations were?

13 A Well, that's very hard for an economist.
14 I mean, I'm not in this business, so I can't say what
15 factors should be looked at. But clearly one would
16 look at the terms of the contract to begin with.

17 And then I think you would look at what
18 has changed in the expectations that the parties have
19 at the time they wrote that contract and today. And
20 I think you'd actually have to ask them. Can't ask
21 me.

22 Q So as I understand it, it is an inquiry

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1 into -- a question's being directed at the parties to
2 the negotiation?

3 A Yes. But, I mean, you would certainly --
4 I mean, some obvious considerations are what are the
5 consequences of what I do today not only for today,
6 but for the future. And also, am I going to be
7 sitting across the table from this party again, or is
8 this it?

9 Is this my last shot to get -- I mean,
10 again, in this game theory literature to which I
11 referred, which I appreciate you may not be familiar
12 with, the implications for the strategies somebody
13 will adopt depend critically on whether it's a
14 repeated game, so you could be meeting the same party
15 and negotiating over the same issues again in the
16 future.

17 Or it is what's called the static game.
18 We make a decision today and that is the decision that
19 holds for all time. And you can get very different
20 implications because there will be trade offs of
21 future -- of current games.

22 Now -- I would be willing to sacrifice

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1 something now if I think I'm going to meet somebody
2 again in the future and that will affect my future
3 strategies.

4 Q Turning to the second part of your
5 analysis, what is the relevance of the parties'
6 current expectations in setting a fee?

7 A Well, if they are very different from the
8 expectations they held at the time of the last
9 negotiated contract, that makes the last negotiated
10 contract a poor benchmark unless -- poor benchmark for
11 what the fee should be today unless you take into
12 account and adjust for the changes in the
13 expectations.

14 MR. SHORE: Okay, I have no further
15 questions.

16 CHAIRPERSON GRIFFITH: All right.

17 Mr. Kleinberg, do you have any questions,
18 sir?

19 MR. KLEINBERG: No.

20 CHAIRPERSON GRIFFITH: Thank you.

21 Mr. Rich.

22 MR. RICH: Thank you, Your Honor.

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CROSS EXAMINATION

BY MR. RICH:

Q Good morning, Ms. Landes.

A Good morning.

Q I take it you present no opinion today as to the methodology the Panel should adopt in setting license fees in this matter, is that correct?

A Well, I think I expressed the opinion that the methodology that's been put forward by Adam Jaffe is not sufficient. But beyond that, I don't provide an alternative methodology, that's correct.

Q So that if we were left merely with your testimony, and I realize we're not, the Panel would be without guidance at least from an economist as to how to set fees in this proceeding, correct? You offer no methodology yourself, correct?

A I think -- I don't know that they'd be left without guidance. I can't say that --

Q At least --

A -- because I have not been here for these proceedings.

Q At least with reference to your testimony,

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1 you've offered none, is that correct?

2 A My only guidance would be that they should
3 take into account changes since the last -- well, let
4 me say if you're going to start with the last
5 negotiated settlement as the basis, then my only
6 guidance would be that you should take into account
7 the changes in circumstances.

8 Q Okay.

9 A But I think they have had other testimony
10 from economists.

11 Q And how much -- by the way, how much of
12 the record of this proceeding have you had occasion to
13 review beyond Professor Jaffe's testimony?

14 A I think I have reviewed the rebuttal
15 testimony submitted by all parties.

16 Q Did you review any of the written or live
17 testimony during the direct phase of this case other
18 than Professor Jaffe's?

19 A I don't believe so.

20 Q So you are unfamiliar with whatever the
21 record may show as to changed circumstance out of the
22 mouths and written testimony on the direct portion of

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1 the case from any witness in this case, is that
2 correct?

3 A That's correct.

4 Q So you don't know sitting here today what
5 has or has not been said about changed circumstances
6 between 1992 and the present, correct?

7 A I think that is correct.

8 Q Okay. And I take it --

9 A Subject to my recalling something.

10 Q I take it your testimony also does not
11 address the relative merit of the approaches taken by
12 the different parties to this proceeding in terms of
13 the fee setting process, correct -- you do not
14 comment, for example, one way or the other --

15 A Right.

16 Q May I finish the question?

17 A Yes.

18 Q -- on the methodology proposed by ASCAP or
19 BMI, correct? I don't see that anywhere in your
20 written direct testimony.

21 A Again, except to say that I think that the
22 methodology proposed by Adam Jaffe on behalf of the

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1 public broadcasters is not -- in its current state,
2 does not provide them with an appropriate basis.

3 Q I understand that testimony, but my
4 question is slightly different. Which is, is it not
5 the case that you nonetheless do not comment, at least
6 I don't see it in your testimony, on the relative
7 merits of Professor Jaffe's approach versus that
8 proposed by either ASCAP or BMI, is that correct?

9 MR. SHORE: Objection to the form. I
10 think you've got a double negative in there.

11 BY MR. RICH:

12 Q Do you understand my question?

13 A I think you're asking me am I opining
14 whether the position taken by one party is better than
15 the other. Is that what you're asking me? In this
16 case.

17 Q I'm asking you whether -- I didn't see
18 that in your testimony.

19 A It was not in my testimony.

20 Q Okay. Now you don't dispute, Ms. Landes,
21 do you, that the 1992 negotiations between ASCAP and
22 the public broadcasters were conducted at arms length,

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1 do you?

2 A I have no basis to dispute that.

3 Q Or that the resulting fees were
4 voluntarily arrived at?

5 A No, I think I've heard testimony in this
6 room that they were.

7 Q And to your knowledge, ASCAP was not
8 coerced into entering into the agreement in 1992, was
9 it?

10 A Well, I think they did as -- they did the
11 best they could given their alternatives. That's not
12 coercion.

13 Q And you don't dispute that the outcome of
14 that negotiation reflected fees that the parties
15 viewed as reasonable under then current conditions, do
16 you?

17 A I do not dispute that. They decided that
18 that was the -- they entered into it voluntarily.

19 Q Correct.

20 A And those were the appropriate fees given
21 their alternatives.

22 Q Correct. And you are aware, I take it,

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1 that there were also negotiations and resulting
2 agreements between ASCAP and the public broadcasters
3 for periods preceding 1993 to 1997, correct?

4 A Yes, I do understand that.

5 Q And that --

6 MR. SCHAEFFER: I'm only just going to --
7 only to preserve for the record, I think everybody
8 knows it's ASCAP's position that this material is
9 prohibited by the contract as being a basis for
10 consideration.

11 I just don't want to waive our rights.
12 And previously, when I had made an objection on the
13 same material with Ms. Jameson, I was overruled. So
14 I just want to go on record saying we still have the
15 same position.

16 MR. RICH: Well, I don't want to engage,
17 because I don't understand this to be an objection, in
18 a long colloquy. It's an ultimately ironic statement
19 when the entire thrust of this witness's testimony is
20 that it is imperative for the Panel to understand what
21 went on at the bargaining table in all of these prior
22 negotiations in order to set a fee.

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1 So it's an extraordinary comment from
2 counsel.

3 MR. SHORE: Objection to the
4 characterization of what this witness's testimony is.

5 MR. SCHAEFFER: On the contrary, I've
6 already stated my position when we submitted the
7 material.

8 CHAIRPERSON GRIFFITH: We understand that
9 it's a continuing --

10 MR. SCHAEFFER: Yes, that's all I ask.

11 CHAIRPERSON GRIFFITH: All right.

12 Mr. Rich.

13 BY MR. RICH:

14 Q Ms. Landes, you are aware that there were
15 prior negotiated outcomes between the parties,
16 correct?

17 A I was -- I am.

18 Q And those two, to your knowledge, were
19 voluntarily arrived at at arms length, correct?

20 A By both parties and all aspects, I
21 presume, of the -- that were incorporated in the
22 contract were voluntarily arrived at.

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1 Q And you have no reason to believe that
2 whatever facts and circumstances were publicly known
3 or otherwise disclosed across the bargaining table by
4 both sides in those negotiations were factors that
5 logically went into the decision making as to what
6 fees to ultimately agree to, correct?

7 A I'm sorry, I don't understand your
8 question.

9 Q I take it you would agree at a general
10 level that whatever information was available, say, to
11 ASCAP about the current economic state of public
12 broadcasting about the degree to which it was moving
13 in the direction of more, say, corporate underwriting
14 activity or the like -- all of those factors, when
15 available to ASCAP, I would assume, you would agree
16 would have been factors ASCAP likely considered in
17 making a judgement about the fee levels to enter into.

18 That's logical, is it not?

19 A Well, I would say they would take into
20 account all information available to them. And I have
21 on idea what weight they would give to what factors.

22 Q Right, right.

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1 But you would assume as rational business
2 people they wouldn't ignore any information they felt
3 to be relevant, correct?

4 A That's correct, they wouldn't ignore it.

5 Q All right. Now incidentally, in your
6 testimony, if you would turn to page one, please. You
7 cite a reference to the 1978 predecessor to this Panel
8 setting a fee for the blanket licensing of ASCAP's
9 repertory of \$1,125,000 per year subject to CPI.

10 Do you see that?

11 A Yes.

12 Q What is the basis for your statement
13 there?

14 A I believe I was informed of that by
15 counsel.

16 Q Did you independently review the record of
17 that proceeding or the actual ruling?

18 A No, I have not had that time.

19 Q Are you certain as to the accuracy of the
20 number you set forth there?

21 A Whether I am certain or not I think is not
22 -- I mean, I am relying on counsel. If it's

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1 incorrect, it doesn't have any bearing on my
2 testimony.

3 Q So you did not independently verify the
4 accuracy of that number?

5 A No, although I did get it from several
6 independent people. But no, I did not. I did not go
7 back to the -- well, I don't believe I went back to
8 the -- don't recall going back to the actual
9 agreement.

10 Q What else did you rely totally on counsel
11 with respect to and in connection with your testimony?

12 A That there was -- that the -- in 1982,
13 1987 and 1992 the agreements between ASCAP and the
14 public broadcasters were negotiated and there was no
15 Rate Court hearing.

16 Q And what about with respect to the factors
17 you cite as likely factors; did you also rely on
18 counsel for their representations as to what likely
19 factors were?

20 A Only one.

21 Q Which was that?

22 A Well, I -- no, let me say that's not -- my

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1 answer's not quite correct. I relied on counsel for
2 the accuracy of the statement that the earlier -- that
3 these negotiated contracts, and in particular the one
4 relied on by Dr. Jaffe in 1992, included a no
5 precedential clause -- a no precedence clause.

6 I did not -- may I look at the other
7 factors there?

8 Q Please.

9 A What page is that?

10 Q I believe page four over to page five.

11 A We certainly discussed these and there are
12 others as well. For example, the fact that you expect
13 to see the other party across the table again in the
14 future. But we discussed these whether they -- you
15 know, I don't remember.

16 Q Was factor one a factor which you divined
17 on your own -- that is, the likely political climate
18 -- or was that a factor suggested by ASCAP's counsel
19 as a "likely factor?"

20 A I talked with them and asked them what
21 were the things that might have changed.

22 Q I see.

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1 A And these were among them.

2 Q Okay. And that's the basis for your use
3 of the adverb likely?

4 A I use the word likely quite a bit.

5 Q You use it quite a bit. Loosely?

6 A I don't mean to, but, you know, we're all
7 -- we're never precise in our language as we would
8 like to be.

9 Q Well, with the benefit of reflection,
10 would you consider a different adverb you think might
11 be more appropriate?

12 A I could take it out.

13 Q I'll leave that to your counsel.

14 A This is not a word that was put into my
15 mouth by anyone other than myself.

16 Q You don't dispute, do you, Ms. Landes,
17 that in past negotiations the public broadcasters and
18 ASCAP typically adjusted royalties for future periods
19 based on the economic experience of the past?

20 MR. SHORE: Objection.

21 In this case or in general?

22 MR. RICH: I'll let my question stand. I

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1 think it's clear.

2 THE WITNESS: I'm sorry, can you repeat
3 the question? I don't dispute --

4 BY MR. RICH:

5 Q You don't dispute, do you, that in past
6 negotiations the public broadcasters and ASCAP
7 typically adjusted royalties for future periods based
8 on the economic experience of the past?

9 A Once a fee was determined, I don't dispute
10 that that fee was then brought forward on some kind of
11 objective basis for the future, that's correct.

12 Q And when you say objective basis, you have
13 in mind what?

14 A COLA, change in revenues, something like
15 that. But that's after the fee -- after the base fee
16 has been determined. And it's really the base fee
17 that reflects all these expectations and also these
18 adjustment factors one might -- in some cases they
19 look to revenue rather than price indices.

20 Q Well, just so I'm clear, at page one of
21 your testimony, if you would turn back to that
22 question. You indicate in the second from the last

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1 sentence on that page, "In 1982, 1987 and 1992 ASCAP
2 and the public broadcasters agreed to licensing fees
3 at a modest step up fairly consistent with inflation."

4 Do you see that?

5 A I do see that.

6 Q Now am I correct in interpreting that
7 consistent with, I believe, Mr. David's testimony
8 yesterday that prior agreed upon license fees were
9 adjusted for a future period based on the actual
10 experience with inflation over the prior period?

11 Is that your understanding of what
12 happened?

13 A I think -- I have not actually read these
14 as you asked me to begin with. I have not actually
15 read these agreements. I believe that what -- and
16 from hearing Mr. David, that what did happen is that
17 a new fee was decided on and it was agreed that it
18 would be stepped up for inflation over the period.

19 And that if you looked at these fees, it
20 would look as though they were simply following an
21 inflation factor from maybe 1978 period, that's
22 correct.

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1 Q I'm just trying to be very specific as to
2 one aspect of your testimony here --

3 A Right.

4 Q -- which is, when you say "stepped up for
5 inflation," you don't understand that to entail a step
6 up for anticipated inflation during the term of the
7 license, do you?

8 A I do not, not with this case actually.

9 Q What do you understand it to mean?

10 A I'm sorry, they have -- I understand it to
11 mean that the fee that was determined, say, in 1982
12 was essentially a stepped up -- the 1978 fee was the
13 basis, and it was essentially stepped up for
14 inflation.

15 But I was not there, so I don't want to
16 characterize what happened.

17 Q So in attempting to probe with you what
18 you meant at the bottom of page one, you're basically
19 saying you're not sure what you mean when you say it
20 was increased as a modest step up consistent with
21 inflation since you haven't reviewed the agreements,
22 is that correct?

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1 A I don't think that's true. I asked what
2 the fees were established at each time period and they
3 were clearly modest increases. And they -- I don't
4 know whether counsel told me. I think counsel said
5 they just basically adjust for inflation.

6 But again, I'm saying that seems to me --
7 here the question is not what did people do in the
8 past, because in the past they faced a certain set of
9 circumstances. Here the question is what are we
10 supposed to do now.

11 Q I believe you testified exactly on this
12 point you've just addressed to Mr. Shore that
13 basically one should ask the parties to the
14 negotiations --

15 A What are their -- yes.

16 Q -- what are their expectations, correct?

17 A That's correct. I think what -- and how
18 they have changed.

19 Q And so you would agree with me that the
20 best and most knowledgeable persons from whom to take
21 guidance according to your suggestions are people who
22 sat at the bargaining table and were intimately

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1 involved in the negotiations, correct?

2 A No, not necessarily.

3 Q Who would be in a better position to do it
4 than, in your words, the parties to the negotiations?

5 A I think the parties who ultimately
6 approved or disapproved those particular license
7 agreements.

8 Q As opposed to the people that actually
9 participated in the give and take and articulated to
10 one another the concerns?

11 A Yes, because I think that those people are
12 really working on behalf of those who make the
13 ultimate decisions. They present their positions,
14 they acquire information, but they don't make the
15 ultimate decision.

16 Q And what knowledge do you have of the flow
17 of information that went from, in the case of ASCAP,
18 to the negotiators to what you term the ultimate
19 decision makers, say, in 1992?

20 A I don't have any specific information. I
21 heard Mr. David testify that the Board is --
22 ultimately approves or disapproves, and so I presume

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1 they and whoever is working on their behalf, their
2 general counsel, whoever their advisors are, are the
3 people who know what the considerations were.

4 Q Are you aware of any testimony in this
5 case in the record, written or presented orally, by
6 any ASCAP representative who was present at any
7 negotiating session in 1992?

8 A I have only read the rebuttal testimony in
9 this case and Dr. Jaffe's direct, so I have a very
10 limited awareness of any information that's been
11 presented to this Panel.

12 Q Have you reviewed Paula Jameson of PBS's
13 testimony?

14 A I reviewed, I think, her rebuttal --
15 whatever was attached to the public broadcasters'
16 rebuttal testimony.

17 Q Are you familiar with her direct testimony
18 in this case?

19 A No, I am not.

20 Q Are you aware of whether she participated
21 at the bargaining table in 1992 on behalf of the
22 public broadcasters?

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1 A I believe she stated so in her -- in the
2 statement that was in the rebuttal testimony.

3 Q I take it you would urge the Panel to give
4 probative weight to whatever her testimony was
5 concerning what the parties' expectations were and
6 discussions were during 1992, correct? That, I take
7 it, is important in your mind in considering
8 appropriate fee setting in this proceeding?

9 A Well, no; I don't think that is correct.
10 I think that what should be taken into account is what
11 the decision makers, people who made the ultimate
12 decision do we accept this -- the alternative is to
13 come to a proceeding like this.

14 Do we accept this or do -- and I -- or do
15 we go to the CRT or to the CARP. And I mean,
16 obviously one thing that's changed, that's clearly
17 changed, is that in the last three go rounds it was
18 accepted. They didn't come to the CARP. But today,
19 they are.

20 So that tells you -- that reveals that
21 something has changed, doesn't it?

22 Q So it reveals that there's a dispute, is

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1 that correct?

2 A It reveals -- look, if Dr. Jaffe's
3 methodology were correct and all ASCAP cared about
4 were those things that he put into that testimony --
5 and that's all I'm talking about today -- then ASCAP
6 should have looked at the proposal and said oh, gee,
7 it's exactly and identically what we have always asked
8 for in the past and what we want, and there would be
9 no point in coming to the CARP.

10 So there -- it's clear there is a dispute
11 because whatever conditions existed that made it
12 attractive to accept that proposal in previous years
13 do not exist today. And I don't know what information
14 has been brought to this Panel.

15 Q What is the basis, incidentally, for your
16 apparent conclusion that Dr. Jaffe premises his
17 analysis on the notion that the only relevant factors
18 at the bargaining table in 1992 were music use and
19 programming expenses? What's the basis for that
20 conclusion on your part?

21 A Well, I have read his testimony. I read
22 his direct testimony. And he did -- those are the

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1 only things that he takes into account.

2 And he discounts anything else because,
3 for some reason, they are not -- to the extent he has
4 considered anything else, he discards it as being
5 important because it doesn't seem important to himself
6 or because he has not found in whatever record -- and
7 I don't know how much of the record he has seen -- or
8 in his interviews -- I presume he has interviewed
9 people at public broadcasting.

10 Maybe he hasn't. But in his investigation
11 he has not found them to be important in his mind.
12 But I don't -- I don't want to say, you know, that
13 Congress can't opine on anything because Congress can
14 opine on anything.

15 But what's important is not what's
16 important to Dr. Jaffe in his mind. What's important
17 is what is important to the people who are sitting at
18 the bargaining table. And again, I can only say the
19 very fact that they are in this room and they didn't
20 conclude something at the bargaining table suggests to
21 me that Dr. Jaffe's analysis must be missing something
22 important.

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1 Q Do you understand Dr. Jaffe to disagree
2 with the premise that we are currently in a dispute
3 which requires resolution by this Panel?

4 A Absolutely not.

5 Q So where is Dr. Jaffe missing something
6 then by suggesting a methodology for adjusting prior
7 fees forward recognizing, as he does, and as you do,
8 that we are in a dispute which needs a methodology for
9 resolution?

10 A Well, I think that he -- if he is going to
11 -- if he believes that his -- that he should be
12 opining on what is the appropriate fee, then I think
13 he has to understand and determine those factors that
14 ended in a dispute rather than in the parties simply
15 agreeing to what they did in the past.

16 Because if, as he is correct, if -- excuse
17 me -- as he opines, the only factors are those that he
18 has used, then the implication should be that there
19 would be no dispute.

20 Q Now just so the record's clear, while you
21 say that the key to this inquiry is to examine changed
22 circumstances, you have not examined those changed

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1 circumstances, correct?

2 A No, I have not; that's correct.

3 Q You said you are not in this business, to
4 use your words, correct?

5 A No, I'm not -- not that I'm not in the
6 business of examining changed circumstances. I'm not
7 in the business of being a -- I'm not in the business
8 of music licensing.

9 Q Correct.

10 A Or of public broadcasting.

11 Q Correct, right. And you've undertaken no
12 independent examination of what factors may or may not
13 have changed of relevance to the fee setting here
14 between the time of the 1992 negotiations and the
15 present, is that correct?

16 A I have --

17 MR. SHORE: Objection.

18 This is just getting repetitive. We keep
19 going over the same --

20 MR. RICH: And so we would agree --

21 MR. SHORE: Wait.

22 CHAIRPERSON GRIFFITH: Do you want to

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1 respond to his objection?

2 MR. RICH: I don't believe I'm being
3 repetitive and I don't believe I've been attempting to
4 be repetitive at all.

5 CHAIRPERSON GRIFFITH: Are you moving into
6 a new area?

7 MR. RICH: I'm concluding my entire
8 examination, Your Honor.

9 CHAIRPERSON GRIFFITH: Okay, go ahead.

10 BY MR. RICH:

11 Q And so you and I would agree, I take it,
12 that we must let the record on that subject, namely
13 changed circumstance and what the parties knew and
14 expected in 1992 versus what they know and expect in
15 1998, inform the Panel's judgement, is that correct?

16 A I think that the -- that should inform the
17 Panel's judgement, that whatever was in the terms of
18 the prior agreement should inform the Panel's
19 judgment. And I presume the Panel can ask -- I don't
20 know actually how this proceeding goes.

21 But if the Panel wants to ask for more
22 information, I presume that they could.

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1 Q Thank you.

2 MR. RICH: I have no further questions.

3 CHAIRPERSON GRIFFITH: All right.

4 Any redirect?

5 MR. SHORE: No.

6 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

7 MR. KLEINBERG: Nothing, sir.

8 CHAIRPERSON GRIFFITH: Dr. Landes, thank
9 you very, very much. You may step down. You're free
10 to go.

11 THE WITNESS: Oh, great; thank you.

12 (The witness was excused.)

13 CHAIRPERSON GRIFFITH: Okay.

14 MR. SHORE: That was a quick day.

15 (Whereupon, the proceedings were adjourned
16 at 10:07 a.m.)

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Before: Library of Congress
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Date: April 29, 1998

Place: Washington, DC

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